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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 425

UNITED SHOE MACHINERY CORPORATION,

Petitioner,

vs.

THE HANOVER SHOE, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

The sole question presented by the decision of the Court below is whether or not it was correct in holding, as a matter of law, that payment by plaintiff (Respondent) of excessive charges for shoe manufacturing machinery which it leased from defendant (Petitioner), the manufacturer and owner of such machinery, constituted injury to plaintiff "in his business or property" within the meaning of Section 4 of the Clayton Act, 15 U. S. C. A. Sec. 15, in the amount of such excess charges. The separate trial in the

District Court proceeded on the stipulated assumptions that (1) defendant's charges imposed upon plaintiff for use of shoe manufacturing machinery were excessive as alleged and (2) the said excess charges were the result of defendant's monopolization of the shoe manufacturing machinery market in violation of Section 2 of the Sherman Act.

"Questions Presented" as stated by defendant are argumentative in form and were necessarily disposed of by the decision of the Court of Appeals below.

STATEMENT OF THE CASE

The separate trial in the District Court was devoted almost entirely to the issue as to whether plaintiff passed on the excessive lease charges to the shoe buying public. The Court of Appeals affirmed the decision of the District Court which held that plaintiff's cause of action arose when it paid the excessive charges and, therefore, it was unnecessary to make findings of fact on the voluminous evidence on the passing-on issue (Petitioner's Appendix (hereinafter cited as App.) 193a). Plaintiff submits that this is correct and that there is no basis in the decisions below or indeed in the record for the statements of defendant in its petition that the monopolistic over-charges were "passed on by plaintiff to its customers" (Petition, p. 1) or that plaintiff "recovers them from his customers" (Question 2, Petition p. 2) or that they were "paid by plaintiff's customers" (Petition p. 4) or that plaintiff did not prove that it ultimately sustained damage when it paid the excess charges (Petition p. 5).

POINT I

The decision below is not in conflict with the decision of any other Court of Appeals on the same matter.

The District Court held that plaintiff had a cause of action "for the difference between what plaintiff was charged and what it could properly have been charged in the absence of monopolistic practices" (App. 193a-194a). The District Court further held that "This excessive price is the injury. The causal relation between defendant's wrong and plaintiff's harm is obvious" (App. 194a).

Defendant sought to avoid the force of this holding by urging upon the Court of Appeals the four well known oil jobber decisions (Petition pp. 7-9). It now contends that the rejection of these decisions has created a conflict between Courts of Appeals.

The four oil jobber decisions are plainly distinguishable. All four were an outgrowth of the convictions of various oil companies for having illegally fixed and raised tank wagon prices of gasoline, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). The plaintiffs in each case were jobbers who bought gasoline at the tank wagon price from defendant oil companies for resale. Their treble damage actions were based on the increased cost to them of gasoline due to the illegally fixed and raised tank wagon prices.

The opinion of the District Court below distinguished all four decisions on the ground, urged by plaintiff, that "those cases involved middlemen who were selling a product supplied for resale by a Sherman Act violator whereas plaintiff here is simply a lessee of equipment which sells

its own product" (App. 197a). The Court also noted that in two of these cases, *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F. 2d 747 (8th Cir.), cert. denied 314 U. S. 644 (1941) and *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F. 2d 580 (8th Cir.), cert. denied 326 U. S. 734 (1945), the jobbers operated under margins which were guaranteed by contract with their suppliers so that "the original impact of the pecuniary loss never fell on the jobbers at all" (App. 197a).

Defendant seeks to find conflict with *Wolfe v. National Lead Co.*, 225 F. 2d 427 (9th Cir.) cert. denied 350 U. S. 915 (1955). It refers to what it describes as an alternative holding, but what the Court below properly describes as a dictum (App. 198a), as to passing-on by a paint manufacturer of an excessive charge for titanium pigment. Defendant does not mention in its petition the decision of the same Court of Appeals in the later case of *Flintkote Co. v. Lysfjord*, 246 F. 2d 368, cert. denied 355 U. S. 835 (1957). In that case, as the District Court below noted (App. 198a), the Court of Appeals relied on its earlier decision in the *Wolfe* case for other points but made no reference at all to the dictum in holding that damages were proven when plaintiff showed that he paid a higher price for his supplies as a result of the antitrust violations, 246 F. 2d at 389-90.

The dictum of the *Wolfe* case has been disapproved in the holding in the later *Flintkote* decision. Whatever conflict might have existed between a dictum in the 9th Circuit and the decision below has been resolved. The decision below is in accord with the *Flintkote* case in applying the correct rule of damage.

POINT II

The decision below is in conformity with decisions of this Court on the same matter.

The decision below, in accepting and applying the elementary rule of damages stated in Point I, above, is in conformity with long standing decisions of this Court and of lower federal courts in treble damage actions under the antitrust laws.

Chattanooga Foundry and Pipe Works v. *City of Atlanta*, 203 U. S. 390 (1906) - allowing recovery of the difference between the price paid for pipe and the price that the city would have had to pay had there been no illegal combination.

Thomsen v. *Cayser*, 243 U. S. 66 (1917) - allowing recovery of the difference between the excess freight rate fixed by a combination and paid by a shipper and a reasonable rate.

Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U. S. 555 (1931) - allowing recovery of the difference between amounts realized by plaintiff on sales and amounts that would have been realized except for the unlawful acts of defendants.

The principles stated in the foregoing leading cases have been applied in a large number of lower court cases. The following are a few of such decisions.

Straus v. *Victor Talking Machine Co.*, 297 Fed. 791, 799, 802-803 (2nd Cir., 1924);

Pfotzer v. *Aqua Systems*, 162 F. 2d 779 (2nd Cir. 1947);

Peto v. *Howell*, 101 F. 2d 353, 361 (7th Cir. 1939);

American Crystal Sugar Co. v. Mandeville Island Farms, 195 F. 2d 622, 625 (9th Cir. 1952), cert. denied 343 U. S. 957 (1952);

La Chapelle v. United Shoe Machinery Corp., 90 F. Supp. 721 (D. Mass. 1950);

Alden-Rochelle, Inc. v. American Society of Composers, Authors & Publishers (ASCAP), 80 F. Supp. 888, 898 (S. D. N. Y. 1948).

Contrary to the statements made in defendant's petition, pp. 14-15, the decision below is neither novel nor inconsistent with controlling decisions of this Court. It does not in any sense unsettle the law.

On the contrary, a decision in accordance with the theory urged by defendant, would leave the fruits of defendant's monopolization, the excessive charges, in the hands of the wrongdoer. These charges were paid out of pocket by plaintiff each year to defendant. The only way plaintiff could have been made whole would have been by a refund of the amount of the excess by defendant itself. That is what is sought in this claim for damages.

There is no windfall to plaintiff, as defendant urges. There is no injustice. The situation is the opposite. If defendant's defense of passing on is accepted, a fence will be built around defendant's wrongful gain from its monopolization of the shoe machinery trade. Plaintiff will have no redress. The precedent so created would leave without remedy future consumer victims of monopolistic producers. Such a result was rejected by the Court of Appeals. It would run directly counter to the Congressional policy stated in the treble damage provisions of the antitrust laws. If accepted, it would devitalize, if not nullify, the Congressional policy.

CONCLUSION

For all of the foregoing reasons, defendant's petition for writ of certiorari should be denied.

Respectfully submitted,

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New York, December 5, 1960